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No. 901

In the

# Supreme Court of the United States

OCTOBER TERM, 1958

BEN JACK CAGE,

*Petitioner,*

*v.*

STATE OF TEXAS,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS


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BEN JACK CAGE,

*Petitioner,*

*v.*

STATE OF TEXAS,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

Ben Jack Cage, Petitioner herein, prays that a writ of certiorari issue to review the judgment of the Court of Criminal Appeals of the State of Texas entered on the 28th day of May, 1958, and motion for rehearing overruled January 28, 1959, with a dissenting opinion, and second motion for rehearing overruled February 11, 1959. R. 673.

## CITATION TO OPINIONS BELOW

The majority opinion of the Court of Criminal Appeals of the State of Texas (R. 592-600), printed in the appendix

hereto, infra, page 19, is reported in *320 S. W. 2d 364*. The dissenting opinion of Davidson, Judge, printed in the appendix hereto, is likewise reported in *320 S. W. 2d beginning at page 370*. The order overruling the second motion for rehearing is unreported and is printed in the appendix hereto, infra, page 51.

## JURISDICTION

Judgment of the Court of Criminal Appeals was entered May 28, 1958, R. 601; infra, page 56. Rehearing was denied on January 28, 1959 by the majority of the Court without written opinion, Judge Davidson dissenting in a written opinion. R. 633. Second motion for rehearing, without written opinion, was overruled February 11, 1959. R. 672. Jurisdiction of this Court is invoked under *28 U. S. C. Section 1257 (3)*.

The Court of Criminal Appeals of the State of Texas is the Court of last resort in Texas in all matters within its jurisdiction. Its judgments and orders are not reviewed by the Texas Supreme Court, or by any other Texas Court.

Petitioner was indicted, tried and convicted of embezzlement, an offense denounced by the laws of the State of Texas. The Court of Criminal Appeals of the State of Texas, in affirming the conviction of Petitioner, departed from long established and fundamental principles of Texas law, thereby depriving and denying Petitioner due process of law and the equal protection of the laws guaranteed to him by the Fourteenth Amendment to the Constitution of the United States.

The opposite, contradictory and conflicting position of the State in its prosecution of Petitioner with respect to corroboration of accomplice witnesses denied Petitioner due process of law and the equal protection of the laws guaranteed to him by the Fourteenth Amendment to the Constitution of the United States.

## QUESTIONS PRESENTED

Whether a conviction in which the Petition was deprived of proper and long recognized legal instructions to the jury concerning innocent intent and claim of right was a denial of due process of law and the equal protection of the laws as guaranteed by the United States Constitution.

Whether the Petition was denied due process of law and the equal protection of the laws when during the trial of the case the State prosecutors asserted that its main State's witness was an innocent agent and not an accomplice witness and after the conviction asserts that such State witness was in fact a conspirator with and equally guilty of the alleged wrong with Petitioner, where no corroborating evidence was in the record as required by Texas law.

Whether the Petitioner was denied due process of law and the equal protection of the laws, when during the trial of the cause the trial court, after being informed that a principal State's witness intended to claim immunity from testifying, required such witness to claim immunity in the presence of the jury, in face of the long and unbroken line of authorities in Texas condemning such action as depriving the accused of his guaranteed rights.

Whether the Petitioner was denied due process of law and the equal protection of the laws by the admission in evidence of sixteen extraneous transactions in violation of the long standing Texas rule that extraneous transactions are admissible only when some issue is presented as to intent, identity or system of an accused, which issues were entirely absent in this cause.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent constitutional and statutory provisions are printed in the appendix beginning on page 17.

## STATEMENT OF THE CASE

In a two count indictment (R. 9) charging theft and embezzlement the Petitioner was convicted of embezzlement on his plea of not guilty and was assessed by the jury a term of 10 years. Proper appeal was made to the Court of Criminal Appeals of the State of Texas, the highest Court in Texas having jurisdiction of criminal matters. R. 56. On original submission the trial court was affirmed. R. 601. On motion for rehearing the Court divided, the majority overruling the motion without written opinion, Judge Davidson dissenting. R. 633. A second motion for rehearing was overruled without written opinion. R. 673. Petitioner has exhausted in this cause each and every remedy available to him other than to this Court. R. 676.

ICT Corporation was the alleged injured party. ICT Insurance Company owned all of the stock of ICT Corpora-

tion, Jack Cage & Company, referred to in the record as Jacco, was the exclusive operating manager for all loans, credit, financing and investments of ICT Corporation. Petitioner was the principal officer of all three corporations.

ICT Insurance Company was engaged in the general insurance business. Prosecution witnesses testified that a Missouri company was desired in order that a re-insurance agreement or treaty could be entered into between the Missouri company and ICT Insurance Company. Missouri Union Corporation was formed with a capital of $100,000.00, which capital was supplied by ICT Corporation in the following manner: A draft was drawn in Missouri on Petitioner, c/o Jack Cage & Company, to a bank at Dallas, Texas. A check drawn on ICT Corporation for $100,000.00 honored the draft and the proceeds of the draft were deposited in the account of Missouri Union Corporation in Missouri. Subsequently Missouri Union Corporation caused Missouri Union Insurance Company to be formed and the re-insurance agreement was entered into between such company and the ICT Insurance Company.

As to the transaction for which Petitioner was tried, the record was void of any evidence that Petitioner ever received any money from the proceeds of the ICT Corporation check or from the proceeds of the Missouri Union Corporation draft. At all times such proceeds were under the direct control of the Missouri Union Corporation. ICT Corporation carried on its books the disbursement of the $100,000.00 as an item of "accounts receivable" from Mis-

souri Union Corporation. The record further discloses that during the month of the purported transaction ICT Corporation was indebted to Petitioner's management company, Jack Cage & Company, in the amount of $1,511,664.48 (R. 236), and that many transfers and advances of funds were made back and forth between the ICT Corporation and Jack Cage & Company. R. 237.

Upon the trial of the cause Petitioner timely requested proper instructions to the jury covering innocent intent and a claim of right with respect to the transaction involved and objected to the refusal of the Court to so properly instruct the jury.

Petitioner timely and properly objected to the admission in evidence of 16 extraneous transactions, being 16 checks of ICT Corporation issued to one J. B. Saunders for legal services. The issues of identity, intent or system were not affirmatively raised in the case to authorize such admission.

Petitioner timely objected to the trial court's requirement that a main State's witness, J. Byron Saunders, the alleged recipient of the 16 checks, be required to claim his immunity in the presence of the jury when such witness had previously and out of the presence of the jury informed the Court and the prosecution that he intended to claim his immunity on the ground of self-incrimination.

At the trial of the cause no question was raised as to the State's witnesses being accomplice witnesses and therefore requiring corroboration under Texas law. Before the Court

of Criminal Appeals Petitioner raised the issue that the State's witness Knoll was an accomplice. Before the Court of Criminal Appeals the State asserted in writing that its witness Knoll was an innocent witness. R. 573. While motion for rehearing was pending, in a suit filed by the State of Texas, various pleadings were filed charging said witness Knoll as a conspirator and abettor in the transaction for which Petitioner was convicted. The Court of Criminal Appeals of Texas permitted the filing of a copy of the petition in such cause which was attached to Petitioner's second motion for rehearing and appears in the record in this cause in a separate but un-numbered exhibit. The Court of Criminal Appeals of Texas failed to write on this matter. This matter arose for the first time after the filing of Petitioner's motion for rehearing.

In the majority opinion (R. 593), Judge Dice recognized the rule in Texas which prohibits evidence of extraneous transactions except under well recognized exceptions, to-wit, where identity, intent or system is an issue and held that under such exceptions the 16 extraneous transactions were admissible. Judge Dice in the same opinion in disposing of Petitioner's claim that he was entitled to proper instruction to the jury on the issue of a claim of right, disposed of the issue by holding that the issue of claim of right was not raised. Felonious intent to embezzle and a taking under a claim of right are directly in conflict and are exactly adverse to each other under Texas law.

Each and all of the above questions raise a substantial federal question and were specially set up and claimed in the State Court proceedings.

The question as to the witness on the trial of the case being an innocent agent but subsequently charged as a conspirator in the transaction could only be raised for the first time on the second motion for rehearing since it was an unexpected assertion by the State after the submission of the motion for rehearing and Petitioner had no prior opportunity to anticipate or assert the federal question of denial of due process and equal protection.

## REASONS FOR GRANTING THIS WRIT

1. The decision of the Court of Criminal Appeals of the State of Texas is irreconcilable in itself as regards the admission into evidence of extraneous transactions on the one hand and the refusal of proper and legal jury instructions on the other hand.

The trial court admitted into evidence 16 checks payable to J. B. Saunders on the limited issue of intent. This action was affirmed, as shown in the majority opinion, for the supposed reason that intent was affirmatively raised by the evidence. For almost a hundred years it has been the rule in Texas that extraneous transactions are not admissible unless and until evidence is adduced raising the issue of a lack of intent. The citations will be cited later in this petition. The Court, after approving the admission of the extraneous transactions upon the theory that the issue of intent was affirmatively raised, then considered the re-

quested jury instructions of Petitioner on his claim of right or innocent motive. In disposing of this issue, and in the same majority opinion, the Court of Criminal Appeals disposed of the issue on jury instructions by holding the issue of claim of right was not raised by the evidence. The rule of law steadfastly adhered to by Texas Courts for many years is that every issue raised by the evidence should be submitted to the jury and that it is fundamental error to refuse same upon proper request. Authorities will be cited later for the benefit of this Court. Judge Davidson, in the dissenting opinion from the majority, did not speak as to the Court's charge but strongly pointed out that there was no issue of fact in the case authorizing the admission of the 16 checks as extraneous transactions.

The admission of extraneous transactions under one theory of law and then eliminating such theory entirely from the case to deny proper jury instructions constitutes a denial of due process of law and the equal protection of the laws as guaranteed by the Federal Constitution.

As to admission of extraneous crimes and transactions, the Texas Court has consistently held that same are not admissible to show identity, intent or system unless some of these matters are in issue. *Deaton v. State, 60 S. W. 670 (1901); Parker v. State, 75 S. W. 30 (1903); Glenn v. State, 76 S. W. 757 (1903); Burk v. State, 89 S. W. 1077 (1905); Barnett v. State, 99 S. W. 556 (1907); Clark v. State, 128 S. W. 13 (1910); Bowman v. State, 155 S. W. 939 (1913); Gray v. State, 178 S. W. 337 (1915); Daniel*

*v. State, 212 S. W. 2d 636 (1948); Carmean v. State, 290 S. W. 2d 240 (1956); Ernster v. State, 308 S. W. 2d 33 (1957).*

And again the long standing Texas rule is that if the evidence raises the issue of lack of intent, the jury must be instructed that the accused is not guilty if they believe or have a reasonable doubt as to the innocent intent or claim of right.

A Texas Statute, Article 41 of the Penal Code provides that if a person laboring under a mistake as to a particular fact shall do an act which would otherwise be criminal he is guilty of no offense.

The Court must charge it in cases where the issue is raised by the evidence. If one is of the impression that he had a right to do what he did, he is not guilty of wrongdoing. *Giddings v. State, 83 S. W. 694 (1904); Parker v. State, 57 S. W. 668 (1900); Daniels v. State, 272 S. W. 143 (1925); Wood v. State, 39 S. W. 2d 1094 (1931).*

Under Texas law an accused is entitled to an affirmative instruction on the defensive issues raised, whether raised by the testimony of the State or that of the accused. *Jones v. State, 216 S. W. 884; Caldwell v. State, 40 S. W. 2d 131; Lee v. State, 97 S. W. 2d 697.*

Petitioner raised the issue of due process in the lower Court in connection with the matters above set out. R. 614, R. 616, R. 665 and dissenting opinion of Judge Davidson, R. 647.

2. The change of position of the State prosecution, adverse and to the detriment of Petitioner, in claiming on the trial that its main witness was an innocent agent and not an accomplice witness, and after affirmance of conviction, but during pendency of rehearing, asserting said witness was a conspirator and equally guilty of the offense with Petitioner, denied to Petitioner due process of law and the equal protection of the laws as guaranteed by the Federal Constitution. Corroboration of an accomplice witness offered by the State is necessary by the Statutes of Texas, Art. 718 Code of Criminal Procedure of the State of Texas. The State's claim as to the witness, Knoll, during the course of the proceedings was that such witness was an innocent secretary of the alleged injured party. R. 573. The contrary assertion was made, as to a wrongful participation by said witness, while this cause was pending on motion for rehearing. Ordinarily it is too late for Petitioner to raise the federal question on rehearing in the State Court after that Court has pronounced its final decision. *McCorquodale v. Texas, 211 U. S. 432.* However, the Texas Court of Criminal Appeals had not at the time made its final decision, and, in addition, where as in this case, a litigant has no prior opportunity to anticipate or assert the particular federal question, the rehearing is recognized as his only chance to present the matter to this Court.

*Brinkerhoff-Faris Trust Co. v. Hill, 281 U. S. 673.*

Knoll was the only witness for the State to connect the Petitioner with the particular transaction in question. If

Knoll was an accomplice, he has to be corroborated by other evidence. Legal questions concerning the competency and legal effect or sufficiently of the evidence or the theory upon which the case was submitted to the jury are open to the Supreme Court. *Graham v. Gill, 233 U. S. 643; Chicago, B&Q R. Co. v. Chicago, 166 U. S. 242.*

Texas recognizes that a change of position of the State, adverse or detrimental to an accused, is grounds for reversal of a conviction. *Callas v. State of Texas* (unreported at time of this petition). The opinion of the Court of Criminal Appeals appears in appendix, page 53. In this case two men, Callas and Schaff were around a pick-up truck. Callas was tried for driving same while his operator's license was suspended. A State officer testified that Schaff was not driving and it was largely upon his testimony the jury found Callas guilty. After jury retired, the officer charged Schaff with driving the truck. The Texas Court of Criminal Appeals reversed the Callas conviction so that upon another trial the appellant might have the benefit of the evidence regarding Schaff.

The provisions of the Federal Constitution were raised in the State Court at the earliest opportunity after the change of the State's position. R. 659.

3. In a long and unbroken line of decisions the Court of Criminal Appeals of Texas has held that a witness, desiring to claim his immunity from testifying under Section 10, Article 1 of the Texas Constitution, shall not be required to do so in the presence of the jury. The Texas Constitutional provision is found in the appendix, page

18. *Harris v. State, 144 S. W. 232 (1912); Mathis v. State, 209 S. W. 150 (1919); Rice v. State, 59 S. W. 2d 119 (1933); McClure v. State, 251 S. W. 1099 (1923); Rice v. State, 51 S. W. 2d 364 (1932); Johnson v. State, 252 S. W. 2d 462 (1952); Washburn v. State, 299 S. W. 2d 706 (1956).*

In the *Washburn* case, supra, the Texas Court of Criminal Appeals stated the trial court committed error in permitting the State to call a co-defendant to the stand and require him to claim his privilege against self-incrimination and refuse to testify in the presence of the jury. "Such refusal to testify was prejudicial because it could be used as an incriminating fact against the appellant." In departing from the existing law of Texas, the action of the Court of Criminal Appeals denied Petitioner due process of law and the equal protection of the laws as guaranteed by the United States Constitution.

4. A decision of a court of last resort of a state, that is so repugnant to the well known and long existing laws and rules of conduct in criminal proceeding, is in itself a denial of the Federal constitutional guaranties of due process and equal protection. It is of vast importance in this case that the dissenting opinion was handed down with the knowledge directly expressed that it would meet the criticism and opprobrium of the public. A portion of Judge Davidson's dissenting opinion is quoted below:

> "I am not blind to or unmindful of the fact that the conclusions I have here expressed, to the effect that appellant has not been tried and convicted in accord-

ance with law and that his guilt has not been established by legal and competent evidence, are contrary to the adverse criticism and publicity and notoriety given to this case and to this appellant."

And cited by Judge Davidson in the opinion are the words of Justice Black in *Bridges v. California, 314 U. S. 252:* "Legal trials are not like elections, to be won through the use of the meeting hall, the radio, and the newspapers."

## CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to the Court of Criminal Appeals of the State of Texas should be granted.

The facts set forth in the above application are duly verified by Ivan Irwin, one of Petitioner's attorneys, who has been duly admitted to practice before the Supreme Court of the United States.

Respectfully submitted,

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1118 Stanford,
Houston, Texas,
*Counsel for Petitioner.*

STATE OF TEXAS
COUNTY OF DALLAS

BEFORE ME, the undersigned authority, personally appeared Ivan Irwin, who after being duly sworn, upon oath states that the facts contained in the foregoing petition for writ of certiorari are true and correct.

IVAN IRWIN

SUBSCRIBED AND SWORN to by Ivan Irwin on this the day of 1959.

*Notary Public in and for*
*Dallas County, Texas*

## CERTIFICATE

I hereby certify that a copy of the foregoing petition for a writ of certiorari was deposited in the United States mail, properly addressed and stamped, to the Attorney General of the State of Texas.

# APPENDIX

## AMENDMENT 14, SECTION 1 UNITED STATES CONSTITUTION

Due process and equal protection of laws * * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## ARTICLE 718 CODE OF CRIMINAL PROCEDURE OF THE STATE OF TEXAS

A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense.

## ARTICLE 41, PENAL CODE OF THE STATE OF TEXAS

If a person laboring under a mistake as to a particular fact shall do an act which would otherwise be criminal he is guilty of no offense, but the mistake of fact which will excuse must be such that the person so acting under a mistake would have been excusable had his conjecture as to the fact been correct, and it must also be such mistake as does not arise from a want of proper care on the part of the person so acting.

## ARTICLE 1, SEC. 10, TEXAS CONSTITUTION

Sec. 10. In all criminal prosecutions the accused shall have a speedy public trial by an impartial jury. He shall have the right to demand the nature and cause of the accusation against him, and to have a copy thereof. He shall not be compelled to give evidence against himself, and shall have the right of being heard by himself or counsel, or both, shall be confronted by the witnesses against him and shall have compulsory process for obtaining witnesses in his favor, except that when the witness resides out of the State and the offense charged is a violation of any of the anti-trust laws of this State, the defendant and the State shall have the right to produce and have the evidence admitted by deposition, under such rules and laws as the Legislature may hereafter provide; and no person shall be held to answer for a criminal offense, unless on an indictment of a grand jury, except in cases in which the punishment is by fine or imprisonment, otherwise than in the penitentiary, in cases of impeachment, and in cases arising in the army or navy, or in the militia, when in actual service in time of war or public danger.

## COPIES OF OPINIONS BELOW

[592]

**No. 29,751**

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BEN JACK CAGE, *Appellant,*

*v.*

THE STATE OF TEXAS, *Appellee.*

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**APPEAL FROM**
**Dallas County**

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**AFFIRMED**

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**OPINION BY**

*DICE*
*Judge*

---

**FILED IN THE COURT OF CRIMINAL APPEALS**
**Austin, Texas**

May 28, 1958
GLENN HAYES,
*Clerk*

[593]

BEN JACK CAGE, Appellant
No. 29,751 v.
THE STATE OF TEXAS, Appellee } Appeal from Dallas County

## OPINION

The conviction is for embezzlement of money of the value of fifty dollars or over; the punishment, 10 years confinement in the penitentiary.

The State's evidence shows that appellant was Vice-President of the ICT Corporation, a corporation chartered under the laws of The State of Texas, with its principal place of business in the City of Dallas, Dallas County, Texas. The original corporate name of the corporation was ICT Discount Corporation which was later, by charter amendment, changed to ICT Corporation. ICT Corporation together with ICT Life Insurance Company and ICT Insurance Company of Texas was managed by Jack Cage and Co., of which appellant was president and principal stockholder.

Francis J. Knoll, Secretary of the ICT Corporation, upon being called as a witness by the State, testified that on June 22, 1955, a draft in the amount of $100,000.00 addressed to appellant and payable to Missouri Union Corporation was received for payment at the Mercantile National Bank in Dallas; that on such date appellant called by telephone and advised him of the draft and told him to pay the same from funds of ICT Corporation; and pursuant to appellant's instructions he paid the draft by

issuing and delivering an ICT Corporation check in the amount of $100,000.00 to the Mercantile National Bank on the account of the corporation in that bank which check was signed by him as secretary and his assistant as co-signer. That by virtue of a bank resolution on file the officers of ICT Corporation were authorized to sign checks on the corporation and by virtue of their offices in the corporation both he and the appellant had care, custody, possession and control of the money belonging to the corporation in the Mercantile National Bank in Dallas. The witness further testified that after the $100,000.00 disbursement, the item was carried on the books of ICT Corporation [594] as an account receivable from Missouri Union Corporation; that the item was not considered as a loan and no payment was received of the account up to the time he left the company in February, 1956.

Edmond B. Welshans, President of Missouri Union Corporation, called as a witness by the State testified that upon receipt of the $100,000.00 from the draft drawn on appellant, Missouri Union Corporation issued 20,000 shares of stock to three nominees of appellant; that upon receipt of the money and issuance of the stock the transaction was completed and Missouri Union Corporation did not owe ICT Corporation as a result of the transaction. He further testified that shortly after the $100,000.00 was deposited to the account of Missouri Union Corporation, in a bank in Kansas City, Missouri, the appellant, who was chairman of the Board of Missouri Union Corporation, withdrew $96,000.00 from the account by signing a check

on the corporation; that when the transaction was discovered and called to his attention appellant advised that the withdrawal had been made in the name of the Corporation as an investment; that later the sum was secured by a note in the amount of $100,000.00 executed by the Oxford Corporation and a collateral pledge agreement executed by appellant whereby the 20,000 shares of stock which had been issued by Missouri Union Corporation to appellant's nominees were pledged as collateral security for payment of the note and that the 20,000 shares of stock were thereafter acquired by Missouri Union Corporation in cancellation of the balance due on the note.

Paul C. Sparks, a director of the ICT Corporation and member of the investment committee, testified that he had no knowledge of the $100,000.00 disbursement of ICT funds in payment of the draft drawn on the appellant and that it was made without his permission and consent.

Appellant did not testify but through his interrogation of the State's witnesses and exhibits introduced in evidence sought to show that the purpose of the $100,000.00 disbursement was to loan the money to Missouri Union Corporation to form an insurance company in Missouri which would enter into a re-insurance treaty [595] with the ICT Insurance Company to take over the company's business in Missouri. It was shown by appellant that in the transactions between the ICT group in Texas and the Missouri Union Corporation the sum of $420,000.00 was loaned by ICT Corporation to Missouri Union Corporation; however, the evidence shows that the loan was approved

by the directors of ICT Corporation, a note and collateral security was given therefor and the loan was paid without reference to the $100,000.00 disbursement. Appellant also sought to show that the $100,000.00 item carried on the books of the ICT Corporation as an account receivable from Missouri Union Corporation was paid and settled on July 1, 1956, under the terms of an exchange agreement between ICT Corporation and Jack Cage and Company and evidence was offered by the State which showed that ICT Corporation lost $1,044,984.35 by virtue of the contract of exchange.

Appellant also attempted to show that the $100,000.00 transaction with Missouri Union Corporation was for the benefit of ICT Corporation and all the corporations in the ICT group and that he had no intent to defraud ICT Corporation in the transaction.

We shall discuss the contentions of appellant in the order presented in his brief and oral argument.

Appellant first insists that the Court erred in permitting the State to introduce in evidence 16 checks issued by ICT Corporation to J. B. Saunders, a member of the Insurance Commission of Texas, because they were not shown to be other embezzlements, or offenses of which appellant was guilty, or transactions connected with, or relevant to, the offense charged.

The record reflects that the checks were admitted in evidence by the Court on the issue of appellant's intent after the witness, Knoll, had testified that they were issued

to Saunders upon instructions of appellant for, according to the appellant, legal services rendered to ICT Corporation. Knoll testified that while Saunders could have rendered legal services to the corporation he knew of none rendered by him.

The general rule which prohibits evidence of extraneous offenses has certain well recognized exceptions. Under the exceptions to the rule, evidence of extraneous offenses or transactions is admissible where it shows system; intent, knowledge, identity, etc. Crutchfield v. State, 144 Tex. Cr. R. 291, 162 S. W. 2d 699; Lawson v. State, 148 Tex. Cr. R. 140, 185 S. W. 2d 439 and Campbell v. State, 163 Texas Cr. R. 545, 294 S. W. 2d 125. Under such exceptions to the rule evidence of similar transactions becomes admissible even though it does not show the commission of other offenses. Stanford v. State, 103 Tex. Cr. R. 182, 280 S. W. 798 and Rose v. State, 148 Tex. Cr, R. 82, 184 S. W. 2d 617.

The issuance of the checks to Saunders under appellant's directions were similar transactions to that of the issuance of the $100,000.00 check in question in that company funds were being disbursed at appellant's direction. If Saunders was performing no legal services to the corporation the company was being defrauded as a result of the issuance of the checks under appellant's directions. Under the record the Court did not err in admitting the checks in evidence on the issue of appellant's intent in the $100,000.00 transaction in question.

Appellant next insists that the Court erred in requiring the witness J. Byron Saunders to assert in the presence of the jury his privilege of immunity from testifying. Appellant's contention is presented by Formal Bill of Exception No. 3 which, as originally presented to the Court, certified that the witness Saunders prior to taking the witness stand advised State's Counsel that he intended to claim his privilege, that counsel for appellant so advised the Court and requested that the matter be determined out of the hearing and presence of the jury but the Court ruled the matters were admissible before the jury. The Bill of Exception is approved by the Court with the qualification that "Any matter of act or recitation of testimony set forth in the Bill which are at variance from the facts shown in the official record in this case as prepared [597] by the court clerk and the court reporter are not certified by me as true, but are certified by me as being contention of the defendant."

A reference to the Statement of facts shows that the only reason given the Court by appellant for his request that the witness, Saunders, be examined outside the presence and hearing of the jury was "He's an attorney, member of the Bar, lawyer just like you are." The fact that the witness Saunders was an attorney constituted no legal ground or reason why he should not be examined in the presence and hearing of the jury. Under the record the bill of exception, as qualified, does not reflect error.

The Court, in his charge, limited the jury's consideration of the evidense introduced concerning the checks issued to

J. B. Saunders by instructing the jury that such evidence was admitted to aid them in determining the intent of appellant and for no other purpose and that they could not consider such evidence in determining his guilt or innocence but only in determining his intent and design.

Appellant insists that the charge as given by the Court was erroneous for various reasons. He first contends that it was erroneous because of the use of the term "and/or" in the instruction. That the instruction was not supported by the evidence and was an unwarranted comment by the Court because it referred to checks issued by ICT Insurance Comany rather than ICT Corporation as shown by the evidence. Appellant further insists that the charge was erroneous because it failed to instruct the jury that before they could consider the extraneous transactions they must believe beyond a reasonable doubt that appellant was guilty thereof.

Appellant objected to the charge in the Trial Court in the following language:

> "for the reason the same is not supported by the evidence and same being wrongfully introduced in evidence and not meeting the requisite of the law regarding extraneous transactions. The Charge of the Court thereon constitutes an unwarranted comment by the Court of the evidence in this cause."

Art. 658, V. A. C. C. P., provides that before a charge is read to the jury the defendant or his counsel shall have a reasonable time to examine the same and he shall present his objections thereto in writing "specifying each ground of objection." Under [598] the provisions of this statute

objections to a Court's charge which do not specifically point out the error complained of will not be considered. Dozier v. State, 143 Tex. Cr. R. 397, 158 S. W. 2d 776 and Matterson v. State, 146 Tex. Cr. R. 621, 177 S. W. 2d 791.

Appellant's objection to the charge that it constituted "an unwarranted comment by the Court of the evidence" and did "not meet the requirements of the law regarding extraneous transactions" constituted a general objection to the charge and did not specifically point out to the Court any error therein as required by Art. 658, supra, therefore appellant's complaints to the charge are not properly presented for review. Gill v. State, 84 Tex. Cr. R. 531, 208 S. W. 926; Lucas v. State, 88 Tex. Cr. R. 166, 225 S. W. 257; Parsons v. State, 102 Tex. Cr. R. 524, 278 S. W. 444 and Soto v. State, 161 Tex. Cr. R. 239, 275 S. W. 2d 812.

The Court's refusal to give the appellant's requested charge which would have instructed the jury to acquit appellant if they believed or had a reasonable doubt that he withdrew the $100,000.00 or caused the same to be withdrawn under a claim of right, was not error as the issue of appellant taking the money under a claim of right was not raised by the evidence.

Appellant insists that the Court erred in permitting the State's witness Knoll to testify that the permit of a foreign corporation, Guardian Insurance Company of South Dakota, to do business in Texas was back-dated over the objection that such testimony was irrelevant, immaterial and the records would be the best evidence. The record reflects

that the witness gave such testiony on re-direct examination after appellant had brought out on cross-examination of the witness that through various re-insurance treaties between ICT Insurance Company and certain foreign corporations, the reserve of ICT Insurance Company would be benefited which in turn was for the benefit of ICT Corporation and that such was the purpose of the $100,000.00 disbursement upon which he was being prosecuted. In view of the testimony elicited by appellant relative to the re-insurance treaties between ICT Insurance Company and various foreign corporations the testimony complained of was not subject to the objection of being irrelevant and immaterial. The best evidence [599] rule had no application to the witness's testimony that the permit was back-dated. The rule requiring the production of original writings applies only where the purpose of the evidence offered is to prove the contents of the document. See McCormick and Ray, Texas Law of Evidence, 2nd Ed., sec. 1566. The testimony as to back-dating of the permit only related to when the permit was granted and not to the contents of the instrument.

We find no error in the action of the Court in permitting the State to offer evidence, including a journal entry from the records of ICT Corporation as State's Exhibit No. 5, for the purpose of showing a loss of over $1,000,000.00 to ICT Corporation as a result of its contract of exchange with Jack Cage & Company under date of July 1, 1956. Appellant had sought to show that under the exchange contract the $100,000.00 disbursement to Missouri Union Cor-

poration was fully paid and settled. Art. 728, V. A. C. C. P., provides that when part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other. Appellant, having offered evidence to show that the $100,000.00 was paid and settled in the transaction, authorized the State to offer evidence to show not only that the $100,000.00 was not paid in the transaction but that the corporation lost over $1,000,000.00. State's Exhibit No. 5 was sufficiently identified as the official records of ICT Corporation by its Secretary, Knoll, to authorize its admission in evidence. Art. 3737, V. A. R. C. S. Amberson v. Wilkerson, Tex. Civ. App., 285 S. W. 2d 420.

We overrule appellant's contention that the Court committed reversible error in failing to require the State, in advance of trial, to list or inform the appellant of the names of the witnesses upon which the indictment was found. The record reflects that on October 11, 1957, appellant filed a motion to require the S..te to list on the indictment the names of the witnesses or furnish same to him and on October 14, 1957, action on the motion was deferred by the Court until October 21, 1957, the date the case was set for trial. On October 21, 1957, appellant was furnished with a list of the witnesses by the State after the parties announced ready for trial and no witnesses were called by the State who were not named on the list presented to appellant. The provision of Art. 392, V. A. C. C. P., that the attorney representing the State shall endorse on the indictment the names of the witnesses upon whose testimony the

same was found has been held directory and not mandatory. Walker v. State, 19 Tex. App. 176; Pruett v. State, 114 Tex. Cr. R. 44, 24 S. W. 2d 41; Easterwood v. State, 132 Tex. Cr. R. 9, 101 S. W. 2d 576 and Jackson v. State, 143 Tex. Cr. R. 143, 157 S. W. 2d 921. No injury to appellant is shown as a result of the Court's action: hence, no reversible error appears. Ellisor v. State, 162 Tex. Cr. R. 117, 282 S. W. 2d 393 and Newton v. State, 162 Tex. Cr. R. 519, 287 S. W. 2d 179.

We find the evidence sufficient to support the verdict of the jury finding appellant guilty and overrule appellant's contention that the same is insufficient because of a variance between the allegation in the indictment and the proof as to the name of the injured party. The indictment charged appellant with embezzlement of money from "ICT Corporation, Dallas, Texas, a Corporation." The charter and amendment thereto offered in evidence by the State showed that the name of the corporation was "ICT Corporation." Its principal place of business is shown as being in Dallas, Dallas County, Texas. Such proof was sufficient to support the allegations of the indictment and not in variance thereof, as the words "Dallas, Texas" in the allegation of the indictment clearly were descriptive of the location of ICT Corporation and not of its name.

The judgment is affirmed.

*Dice, Judge.*

Opinion Approved by the Court.

(Delivered May 28, 1958).

[635]

No. 29,751

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BEN JACK CAGE,

*Appellant,*

*v.*

THE STATE OF TEXAS,

*Appellee.*

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APPEAL FROM
Dallas County

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APPELLANT'S MOTION FOR REHEARING OVERRULED (BY MAJORITY) WITHOUT WRITTEN OPINION; DISSENTING

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OPINION BY
Davidson
*Judge*

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FILED IN THE COURT OF CRIMINAL APPEALS
Austin, Texas
January 28, 1959
GLENN HAYES,
*Clerk*

[636]

No. 29,751

BEN JACK CAGE, *Appellant,*

*v.*

THE STATE OF TEXAS, *Appellee.*

*Appeal from Dallas County*

## DISSENTING OPINION

My brethren overrule appellant's motion for rehearing without written opinion.

To that conclusion, as also the original affirmance of this case, I do not agree.

The jury found appellant guilty of the crime of embezzlement.

If that conclusion be wrong, the blame therefor must rest with the jury, for they and they alone were the exclusive judges of the facts proved and of the credibility of the witnesses. It was for the jury to apply the facts to the law as submitted to them by the trial court. The finding of the jury is of no force or effect if there be no facts to support it. The jury can not by their verdict make or supply the facts.

It is the duty of the courts—especially this court—to determine whether the facts authorize the jury's conclusion.

The question of paramount importance, then, is whether the facts warranted the jury's finding that appellant was guilty of embezzlement. Of necessity, it must be known what constitutes the crime of embezzlement and the essential elements thereof. Art. 1534, P. C., furnishes the answer, and reads as follows:

> "If any officer, agent, clerk, employé, or attorney at law or in fact, of an incorporated company, or institution, or any clerk, agent, attorney at law or in fact, servant or employé of any private person, copartnership or joint stock association, or any consignee or bailee of money or property, shall embezzle, fraudulently misapply or convert to his own use, without the consent of his principal or employer, any money or property of such principal or employer which may have come into his possession or be under his care by virtue of such office, agency or employment, he shall be punished in the same manner as if he had committed a theft of such money or property."

It is clear from that statute that there are four elements necessary to be established. These are:

(1) that the accused was the agent of the corporation and, as such agent, was charged with the duty of receiving the money with which he was charged with embezzling;

(2) that the accused did receive the money;

(3) That he received the money by virtue of his agency, and

[637] (4) that he embezzled and converted to his own use the money so received.

Such is the construction this court and its predecessors have placed upon the statute for nearly a hundred years.

See Note 1 of Art. 1534, Vernon's P. C. for attesting authorities, including the case of Fellers v. State, 138 Tex. Cr. R. 307, 136 S. W. 2d 217.

In the indictment the state charged that appellant was guilty of embezzlement under the following allegation that he

> "* * * was an officer, to wit: president, agent, servant and employee of I. C T Corporation, Dallas, Texas, a corporation duly incorporated under the laws of the State of Texas, and the said Ben Jack Cage did then and there fraudulently embezzle, misapply and convert to his own use, without the consent of the said I C T Corporation certain *money* belonging to the said I C T Corporation, Dallas, Texas, a corporation, to wit, one hundred thousand dollars which is of the aggregate value of over fifty dollars, which said *money had come into the possession of, and was then and there under the care of, the said Ben Jack Cage by virtue of such employment as such officer, agent, servant, and employee, as aforesaid* * * *." (Emphasis, supplied.)

I have supplied the emphasis in order to call express attention to the fact that the instant indictment alleged the four elements heretofore set out and that the charge was the embezzlement of money.

There was no allegation in the indictment charging appellant with embezzling any property, stocks, credits, or bank balances belonging to the ICT Corporation.

Having based its case upon the charge of embezzling money, the state was of necessity required to prove that fact as alleged.

When the trial court, at the close of the evidence, came on to charge the jury and give them the law governing this case be recognized it was necessary, in order to convict, that the jury find the four elements above mentioned, and, in obedience thereto, instructed the jury that before they could or would be authorized to convict they were required to find from the evidence beyond a reasonable doubt;

(1) that the defendant was the agent of the ICT Corporation, as alleged, and by the terms of his employment was charged with receiving the money from his principal;

(2) that he did so receive the money belonging to his principal;

[638] (3) that he received it in the course of his employment; and

(4) that he embezzled, misapplied, or converted it to his own use without the consent of his principal or employer.

Note, again, the use of the word "money", which, as the trial court defined and told the jury,

> "* * * includes, besides gold, silver, copper or other coins, bank bills, government notes *and* other circulating medium current as money."

Such is the statutory definition. Art. 1544, P. C.

Under that charge, the jury found appellant guilty of embezzlement, as charged in the indictment. The trial court approved that finding of the jury. My brethren likewise approve that finding.

With that conclusion I do not agree, and respectfully submit that the facts in evidence do not warrant such conclusion.

Here are the facts upon which this conviction rests:

According to the witness Knoll, appellant was vice-president of the ICT Corporation.

The ICT Corporation had an account with the Mercantile National Bank of Dallas, Texas. In order to draw funds upon that account the signature of at least two persons was required on the check. Appellant could act as one of those signers. He could not, upon his lone signature, draw upon those funds.

On the 15th day of June, 1955, the Missouri Union Corporation, a Missouri corporation domiciled at Kansas City, Missouri, drew a draft upon appellant, Ben Jack Cage, c/o Jack Cage & Co., for the sum of $100,000 through the Mercantile National Bank, Dallas, Texas. That draft arrived in due time at said bank, and on June 22, 1955, according to the testimony of the witness Knoll, secretary-treasurer of the ICT Corporation, he (Knoll) paid the draft by delivering to the Mercantile National Bank a check payable to the bank for $100,000 against the funds of the ICT Corporation in that bank, signed by him and one Don Buchholz.

Knoll said that his authority for issuing the check was given him by a person with whom he had a long distance telephone conversation and whom he identified as and whose voice he recognized as that of the appellant, who told him to pay the draft from the funds of the I C T Corporation.

[639] Knoll entered the $100,000 item as and carried it upon the books of the ICT Corporation as an account receivable. He admitted that he drew the check solely because of the telephone conversation and that he consulted with no other official of the ICT Corporation relative thereto.

The $100,000 was remitted to the Missouri Union Corporation in Kansas City, Missouri, and was deposited to the credit of that corporation in a Kansas City bank.

It was this $100,000 that appellant was charged with embezzling and for which he has been convicted.

Welshans, president of the Missouri Union Corporation, testified that for the $100,000 the Missouri Union Corporation issued 20,000 shares of its common stock to three individuals designated by the appellant. Those three persons did not testify in the case. Welshans testified that the transaction whereby the Missouri Union Corporation received the $100,000 was completed with the issuance of the stock.

The effect of Welshans's testimony was that the Missouri Union Corporation sold the 20,000 shares of stock for the $100,000.

At this point in the development of the state's case the testimony takes two divergent trends. I am unable to ascertain therefrom whether the state is contending that appellant converted the 20,000 shares of stock to his own

use or whether the state is contending that appellant converted $96,000 of the $100,000 from the Missouri Union Corporation. Whether one contention is tenable as against the other is immaterial, for the proofs fail to establish either.

Looking, first, to what happened to the $100,000 after it went into the bank account of the Missouri Union Corporation in the State of Missouri:

According to the witness Welshans, about three days after the money reached the bank appellant withdrew the sum of $96,000 therefrom, by check, in the name of the Missouri Union Corporation, signed by him.

[640] Appellant was a director and chairman of the board of the Missouri Union Corporation, which fact is difficult to understand in view of Welshans's testimony that appellant never owned a share of stock in the Missouri Union Corporation.

The cancelled $96,000 check is not a part of this record. The evidence shows that it was payable to the Oxford Corporation, a Nevada corporation.

On January 27, 1956, or about six months after the above transaction and after appellant had severed his connection with the ICT Corporation—which the witness Knoll testified occurred about thirty days prior to January 27, 1956, and which was over a year before this prosecution was instituted—the Oxford Corporation paid the Missouri

Union Corporation $98,268, which represented the principal sum of $96,000 and $2,268 in addition.

Here is the way Welshans described the transaction:

> "Actually, Missouri Union Corporation as a corporate entity bowed out of that transaction, if you use that term, on January 27, 1956, when it drew a draft in the amount of ninety-eight thousand, two hundred and sixty-eight dollars on the Oxford Corporation through Manufacturer's Trust Company in New York City."

So a year before this prosecution was instituted, the Missouri Union Corporation had the $100,000 it originally received and $2,268 profit.

Surely it can not be said that appellant converted the $100,000 or any part thereof. Yet that is the offense for which he stands convicted.

Now what happened to the 20,000 shares of stock?

On February 1, 1956, after the payment of the $98,268 above mentioned, the Oxford Corporation executed a note in the sum of $100,000, payable to the Missouri Union Finance Company, due on demand or six months thereafter.

The Missouri Union Finance Company was a subsidiary of the Missouri Union Corporation. It was not the Missouri Union Corpo- [641] ration. It was a different corporation.

To secure the payment of that note the appellant pledged the 20,000 shares of stock which the Missouri Union Corporation had originally issued. Whether appellant was the

owner of the stock the record does not show, nor is there any evidence that at the time he executed the collateral pledge agreement he was the owner of the shares of stock or that they had been endorsed to him.

The Oxford Corporation made two $20,000 payments, or a total of $40,000, on that $100,000 note to the Missouri Union Finance Company, within a period of two or three months.

Approximately a year thereafter, the Missouri Union Finance Company settled, discharged, and cancelled the Oxford Corporation note by accepting the 20,000 shares, which had been pledged to secure the payment of the note, and by paying $30,000 in cash to the Oxford Corporation. Thus, for the $100,000 represented in the note of the Oxford Corporation to the Missouri Union Finance Company, that company realized $10,000 in cash and the 20,000 shares of stock in the Missouri Union Corporation.

The 20,000 shares of stock thereby went into the possession of the Missouri Union Finance Company, intact and as originally issued by the Missouri Union Corporation.

Appellant got none of that stock. As heretofore stated, welshans testified that

> "• • • there never was a share of the stock in this (Missouri Union) Corporation issued to Ben Jack Cage."

Some four days after the Missouri Union Finance Company acquired the 20,000 shares of stock, or on July 1, 1956, the ICT Corporation and the Jack Cage Company, a

Texas corporation, entered into and executed a sales or exchange agreement whereby the ICT Corporation did "quitclaim unto Jack Cage and Company all of ICT Corporation's rights, titles, interests, claims and demands [642] in and to the following described properties * * *."

Among the properties described are the following:

> "All of the claims, rights and choses in action of ICT Corporation against Missouri Union Corporation, a Missouri corporation, for the 100,000 (sic) paid or advanced to Missouri Union Corporation by ICT Corporation on or about June 22, 1955."

In return, Jack Cage and Company transferred to the ICT Corporation certain properties listed in the agreement.

That agreement was executed in the name of the ICT Corporation by J. A. McFaddin, president, and attested by Marie Myers, secretary-treasurer, and was put in evidence by the state.

The instrument speaks for itself. No signer thereto or any one officially connected with the ICT Corporation challenged its correctness or that the ICT Corporation was not fully paid or compensated for its $100,000 by the property it received in exchange therefor.

The indictment in this case was returned and filed on May 29, 1957, which was approximately eleven months after the ICT Corporation had transferred by quitclaim to another corporation all its interest in the $100,000 it had paid to the Missouri Union Corporation.

The testimony regarding that transaction therefore shows that the ICT Corporation was fully compensated,

long before this prosecution was instituted, for the $100,000 it had advanced to the Missouri Union Corporation and that the Missouri Union Corporation owed it nothing when this prosecution was instituted.

That evidence tends strongly to show that the ICT Corporation parted with its $100,000 to the Missouri Union Corporation voluntarily and that neither appellant nor anyone else embezzled that money from the ICT Corporation.

The most significant feature of that testimony, however, is that it shows consent on the part of the ICT Corporation to the transaction rather than that the $100,000 was paid to the Missouri Union Corporation without its consent.

[643] The foregoing are the facts upon which this conviction rests.

In analyzing and applying these facts to this conviction it is vastly more important to notice the absence of evidence than to note what was proven.

At the outset, let it be understood that I am not passing upon whether the appellant is guilty of stealing from the ICT Corporation or its stockholders, or whether he is guilty of wrecking that corporation, or whether he is a thief or criminal, generally, and ought to be sent to the penitentiary on general principles.

The only matter before this court is whether the facts here presented show that appellant is guilty of embezzling $100,000 in money from the ICT Corporation and converting it to his own use, and that is all I am passing on.

As I have pointed out, it was necessary for the state to prove that the vice-president of the ICT Corporation was charged with the duty of receiving money for and on behalf of the ICT Corporation.

There is not a line of evidence here that shows what the duties of the vice-president of the ICT Corporation were or that it was the duty of the vice-president to receive money in behalf of that corporation.

Yet that is the first essential element of the offense of embezzlement that the state was required to show. This it has wholly failed to do.

The state was also and in addition required to prove the second and third essentials heretofore set out, which are that this appellant did receive the $100,000 here involved, by virtue of the fact that he was vice-president of the ICT Corporation. There is not a line of testimony in this case that so shows. All the facts are to the exact contrary.

[644] The $100,000 was in the actual possession of the Mercantile National Bank. It was in the constructive possession only of those persons who were authorized to exercise control over and to check it out of the bank. Appellant was not authorized to draw a check against that money, either individually or as vice-president of the corporation. The fact that it was necessary for appellant to call upon Knoll and Buchholz to sign the check shows that he could not do so. If appellant had been in either the actual or the constructive possession of the money, he could have exercised that possession and checked out the money.

But mere possession of the $100,000 is not sufficient to show embezzlement. The state was required to show that the $100,000 came into the possession of the appellant as vice-president of the corporation, under the duty imposed upon that officer to receive it. There is not a line of testimony that so shows.

No officer of the bank or any other person testified as to the source of the $100,000 which was in the bank. All that the testimony shows is that there was in the bank to the credit of the I C T Corporation that amount of money.

There is an utter lack of evidence that appellant ever at any time had possession of the $100,000 in the bank or that he received it as vice-president of the I C T Corporation or that any duty was imposed upon the office of vice-president to receive the money.

It is, to me, inconceivable to say that the state has here met the burden of establishing by the evidence the first three of the four elements of the crime of embezzlement heretofore set out. But for the sake of argument, let it be said that if the state did establish those three elements, the completed crime of embezzlement still has not been shown or established.

There remains to be established the fourth essential element [645] which is that appellant embezzled and converted to his own use the $100,000 in money. There is not a line of evidence in this case that the appellant converted that sum of money to his own use.

Conversion of the property by the accused to his own use must be shown in order for the crime of embezzlement to exist. Lawshe v. State, 57 Tex. Cr. R. 32, 121 S. W. 865; Sherman v. State, 124 Tex. Cr. R. 205, 61 S. W. 2d 488.

Here is the law as expressed in 18 Am. Jur., Embezzlement, Sec. 12, page 577:

> "The principle is well established that an essential element of embezzlement is the conversion of the property lawfully in the possession of the accused. If the property is in the actual or constructive possession of the owner, the offense is larceny * * *. Generally, it may be said that mere custody of property as distinguished from possession does not suffice to support an accusation of embezzlement * * *. The reason for this rule is that if a person gains possession of property so as to constitute only a bare charge of custody, such custody does not divest the possession from the true owner and the appropriation of the property under such circumstances amounts to larceny, and not embezzlement."

The case of Smith v. State, 53 Tex. Cr. R. 117, 109 S. W. 118, is cited as supporting the last statement.

The common law of larceny is the same as "theft" under Texas law.

The indictment in this case, in obedience to that requirement, alleged that appellant did, in Dallas County, Texas, "fraudulently embezzle, misapply and convert to his own use" the $100,000.

Under that allegation, the state was under the burden of showing that appellant converted, in Dallas County, Texas, the $100,000 to his own use.

There is not a line of testimony that appellant converted to his own use that sum of money or any part thereof. How could he have converted it to his own use when all the evidence shows that the Missouri Union Corporation received that sum of money and, so far as this record is concerned, still has it? Moreover, under the testi- [646] mony that appellant never owned any stock in the Missouri Union Corporation he could not have even indirectly benefited therefrom.

So the state has utterly failed to prove conversion of the $100,000 as is alleged and charged. But, here again let it be said for the sake of argument that if some time during the trial the state did prove that the appellant converted to his own use the money or the shares of stock purchased therewith or that he received some benefit therefrom, such by no means proves embezzlement.

If everything else I have referred to heretofore were excluded from this record or treated as having been proven, yet there remains one insurmountable obstacle to a conviction in this case which the state can not and does not attempt to overcome or explain:

I call attention to the fact that if there be any evidence of conversion in this case, such occurred only within the State of Missouri and not in the State of Texas.

All the evidence, however, tending to show conversion by appellant of the $100,000, or the stock of the Missouri Union Corporation issued thereafter, occurred in the State of Missouri. If appellant converted any part of the money

to his own use, such conversion occurred in the State of Missouri and not in Texas. If the conversion of the $100,000 by appellant was consummated by the issuance of the Missouri Union Corporation, such occurred entirely within the State of Missouri and not within the State of Texas.

This question as to where any conversion took place is not one of venue, because venue presupposes that an offense has been proven. To the contrary, the question is one of jurisdiction and, until proven, no offense has been shown to have been committed in this state of which the courts of Texas would have jurisdiction.

The jurisdiction of the trial court to find this appellant guilty of the offense of embezzlement has not been shown, nor has [647] the offense of embezzlement by appellant been shown to have occurred within the State of Texas.

Under this record, the undisputed facts, and the law, appellant has not been proved guilty of the offense of embezzlement.

In order that by remaining silent I may not be cast in the position of agreeing to the admissibility of the sixteen checks whereby the funds of the I C T Corporation were paid to J. B. Saunders, I have only to say that there was no issue under the facts of this case which authorized the admission of those checks in evidence.

This admission in evidence violated that rule which says that extraneous offenses and transactions are admis-

sible in evidence only when some issue is presented under the facts of the case as to intent, motive, identity, or system of the accused.

My views upon that question will be found in the dissenting opinion in the case of Parnell v. State, Tex. Cr. R. , 312 S. W. 2d 506.

I am not blind to or unmindful of the fact that the conclusions I have expressed, to the effect that appellant has not been tried and convicted in accordance with law and that his guilt has not been established by legal and competent evidence, are contrary to the adverse criticism and publicity and notoriety given to this case and to this appellant.

It is my duty to decide this case solely under the written law of this state and under the facts and the records here presented and to recognize nothing else. This I have done.

It was Mr. Justice Holmes of the Supreme Court of the United [648] State—whom Mr. Justice Frankfurter, in Craig v. Harney, 91 L. Ed. 1546, at p. 1560, referred to as "an Olympian who was so remote from the common currents of life that he did not read newspapers"—who once said, in referring to our system of justice, in the case of Patterson v. Colorado, 205 U. S. (at page 462), 51 L. Ed. 881, 27 S. Ct. 556:

> "• • • That the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."

It was Mr. Justice Black who said, in the case of Bridges v. California, 314 U. S. 252, 86 L. Ed. 192, 62 S. Ct. 190;

> "Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper."

I respectfully enter my dissent to the affirmance of the instant case.

Davidson, Judge

(Delivered January 28, 1959)

[673]

## MINUTES OF COURT OF CRIMINAL APPEALS
Austin, Texas

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No. 29,751

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BEN JACK CAGE, *Appellant,*

*vs.*

THE STATE OF TEXAS, *Appellee.*

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*Appeal from Dallas County*

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### APPELLANT'S SECOND MOTION FOR REHEARING OVERRULED WITHOUT WRITTEN OPINION

### FEBRUARY 11, 1959

This cause came on to be heard on Appellant's Second Motion for Rehearing, and the same being considered, it is ordered, adjudged, and decreed by the Court that said motion be and the same is hereby in all things overruled.

## UNREPORTED OPINIONS

Callas v. State of Texas (unreported as of the date of this Petition).

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No. 30,094

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FRANK JOHN CALLAS,

*Appellant,*

v.

THE STATE OF TEXAS,

*Appellee.*

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*Appeal from Potter County*

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## OPINION
## ON APPELLANT'S MOTION FOR REHEARING

The complaint and information allege that appellant drove a motor vehicle upon a public road "after the Texas Operator's License of the said Frank John Callas had * * * been suspended", and further alleged that appellant had received an extended period of suspension "of said Texas Operator's License * * *" and that said suspension had not expired.

We have searched the record carefully and find no evidence that the license which had been suspended was a Texas Operator's License, as alleged in the information.

If appellant was driving a motor vehicle, it was a panel truck used as a commercial vehicle in appellant's business, the appropriate license for its operation being a Commercial Operator's License, and not an Operator's License. See Art. 6678b, Sec. 1(n), V.C.S.

This Court has held that there is no such license known to Texas law as a "driver's license". See Hassell v. State, 149 Tex. Cr. R. 333, 194 S. W. 2d 400; Brooks v. State, 158 Tex. Cr. R. 540, 258 S. W. 2d 317.

There were but two persons in or around the panel truck. One was Walter Schaff, who was seated in the driver's seat when the patrolmen reached it. Patrolmen Kirkwood testified that Schaff was not driving the panel truck, and largely upon his testimony the jury found that appellant was the driver.

After the jury retired, Officer Kirkwood filed complaint charging Schaff with driving a motor vehicle in violation of restrictions imposed in his operator's license. Information was presented by the County Attorney and Schaff was convicted upon his plea of guilty.

Appellant's motion for new trial setting forth the conviction of Schaff after the close of the evidence on appellant's trial should have been granted in order that upon another trial appellant might have the benefit of the evidence regarding the conviction of Schaff.

Appellant's motion for rehearing is granted; our former opinion herein affirming the judgment is withdrawn, and the judgment is now reversed and the cause remanded.

Woodley, Judge.

(Delivered January 7, 1959.)

# MINUTES OF COURT OF CRIMINAL APPEALS
## AUSTIN, TEXAS

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**No. 29,751**

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BEN JACK CAGE, *Appellant,*

*vs.*

THE STATE OF TEXAS, *Appellee.*

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*Appeal from Dallas County*

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**AFFIRMED**
**OPINION BY JUDGE DICE**
**MAY 28, 1958**

This cause came on to be heard on the transcript of the record of the Court below, and the same being inspected, because it is the opinion of this Court that there was no error in the judgment, it is ordered, adjudged and decreed by the Court that the judgment be in all things affirmed, and that the appellant pay all costs in this behalf expended, and that this decision be certified below for observance.